

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Joan Frost,
Plaintiff

v.

Civil No. 09-cv-120-SM
Opinion No. 2010 DNH 017

Hartford Life and Accident
Insurance Company,
Defendant

O R D E R

Plaintiff, Joan Frost, brings suit under the civil enforcement provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). She claims that her long-term disability benefits, which she had been receiving under an employee welfare benefit plan sponsored by her employer (the "Plan"), were wrongfully terminated. Defendant, Hartford Life and Accident Insurance Company ("Hartford"), underwrites the Plan and also acts as the Plan administrator.

Pending before the court are the parties' cross-motions for judgment on the administrative record. Based upon that record, the court is constrained to conclude that, because judicial review of Hartford's decision to terminate Frost's long-term disability benefits is deferential, and because that decision cannot be said to have been "arbitrary and capricious," Hartford is entitled to judgment as a matter of law.

Factual Background

Pursuant to this court's Local Rule 9.4(b), the parties have submitted a Joint Statement of Material Facts which, because it is part of the court's record (document no. 11), need not be recounted in this opinion. In brief, the relevant facts are as follows.

I. The Plan.

The Plan provides coverage for both "total disability" and "partial disability." Frost had been receiving benefits for the former, which is defined as follows:

Total Disability or Totally Disabled means that:

- (1) during the Elimination Period; and
- (2) for the next 12 months, [the employee is] prevented by:
 - (a) accidental bodily injury;
 - (b) sickness;
 - (c) Mental Illness;
 - (d) substance abuse; or
 - (e) pregnancy,

from performing the essential duties of [her] occupation, and [is] under the continuous care of a Physician and as a result [she is] earning less than 20% of [her] Pre-disability Earnings, unless engaged in a program of Rehabilitative Employment approved by [Hartford].

After that, [the employee] must be so prevented from performing the essential duties of any occupation for

which [she is] qualified by education, training or experience.

Admin. Rec. at 957 (emphasis supplied). Immediately prior to her disability, Frost had been earning \$2,091.27 per month. Admin. Rec. at 37. So, to be totally disabled under the terms of the Plan, Frost must, among other things, be earning less than \$418.25 per month (i.e., twenty percent of \$ 2,091.27). Or, stated slightly differently, if Frost is capable of earning more than \$418.25 per month, despite disability due to a listed condition, she is not "Totally Disabled" under the Plan.

II. Plaintiff's Disability Claim.

Ms. Frost worked for Wal-Mart Stores, Inc., at one of the company's Sam's Club membership warehouses, as a maintenance supervisor. After being diagnosed with cardiomyopathy (apparently caused by a viral infection), superimposed upon a pre-existing diagnosis of fibromyalgia, Frost was no longer able to work. She applied for, and was granted, short-term disability benefits. She also applied for, and was granted, Social Security disability benefits. Admin. Rec. at 905.

Subsequently, Frost applied for long-term disability benefits under the Plan. As Plan Administrator, Hartford reviewed her claim, concluded she met the Plan's definition of

total disability, and granted her request for benefits, effective September 10, 2001. Frost's long-term disability benefits were continued beyond September 10, 2002 (i.e., the one-year anniversary of her award of benefits), after Hartford determined that she was not only unable to perform the essential duties of her own job as a maintenance supervisor, but that she was also unable to perform "the essential duties of any occupation for which [she was] qualified by education, training or experience." Admin. Rec. at 957.

In October of 2003, Frost underwent surgery to have a cardiac pacemaker implanted. Between 2003 and 2007, Hartford periodically obtained statements from both Frost and her treating physicians concerning her medical conditions and her ability to return to the workforce. Each time, Hartford concluded that she remained totally disabled, as defined in the Plan, and continued her long-term disability payments.

In the fall of 2006, Frost completed a "Personal Profile Evaluation" and reported that she "can't stand, or walk, or sit, or lift because of [her] heart condition and fibromyalgia." Admin. Rec. at 654. In the summer of 2007, Hartford began a more thorough review of Frost's file and retained a private investigator to watch Frost and to report on her activities of

daily living. Observations made by the investigator were inconsistent with Frost's claims, as she appeared able to enter and exit her car, stand, sit, bend over, and walk without difficulty. Those observations were summarized as follows:

The claimant asserts she cannot stand, walk, sit or lift because of her heart condition and fibromyalgia. Her doctor states all activities are limited by dyspnea [i.e., shortness of breath], pain and fatigue. Conversely, the activity checks showed the subject active during two of the three days. She was observed standing, walking, sitting, driving and using her hands in an unrestricted fashion. The subject also frequents a social club, but her activities while inside are unknown.

A face-to-face interview was conducted by Hartford Investigator James Fitzgerald on 10/24/07. I/A notes the following inconsistencies:

The claimant admitted to playing badminton with her niece and nephew last summer.

The claimant states she performs a daily home exercise program for 10-15 minutes, including lifting a bar to strengthen her arms and body. She also states she walks outside or at a mall for 30 minutes twice weekly.

The claimant states she can walk a maximum of 1/4 mile and it takes her 45-60 minutes. This is a very slow pace of one [sic] mile per hour. During the activity checks, the claimant walked with a normal gait at a normal pace.

The claimant states she can stand a maximum of 10-15 minutes. During the activity check, she was seen standing for over 20 minutes.

The claimant states that bending to collect something from the floor causes her pain to increase to a 5-6/10. During the activity check she dropped a cigarette, bent over to collect it, then stood with no noticeable pain symptoms.

The claimant states she can squat, but would need assistance from someone [or] something to rise to a standing position. During the activity check, she was seen sitting on a bottom step near the ground, then standing without assistance from a person or even using the hand-rail right beside her.

The claimant states she cannot keep her balance. During the activity check, no balance problems were observed.

The claimant states she has difficulty entering and exiting a vehicle. During the activity check, she was seen entering and exiting her vehicle on several occasions without difficulty.

Admin. Rec. at 56. That summary accurately describes Frost's activities during the three days she was observed. See Admin. Rec. at 1013-14 (copies of surveillance videos). It seemed, then, that when speaking with her treating physician, Frost had exaggerated, at least to some degree, the extent and disabling nature of her pain. See, e.g., Admin. Rec. at 172-75 (Frost's claimed limitations, as reported by her primary care physician, Dr. Brian Claussen).

So, in the fall of 2007, Hartford requested Frost's medical records from Dr. Claussen, as well as Dr. Lavery (her cardiologist). In their joint statement of material facts, the parties summarized Dr. Lavery's records as follows:

04/27/2006 - Letter from Dr. Lavery to Dr. Claussen. Patient has had more fatigue. She has been less active because of the winter and because of a fracture to her foot. She is not having any worsening dyspnea. She

had an echo in January that showed an ejection fraction of 45-50% which is markedly improved. AR at 00647.

09/19/2006 - Letter from Dr. Lavery to Dr. Claussen. Patient has been limited mostly by her fibromyalgia. There was a time when she has had to walk with a cane. She is not having any major symptoms of dyspnea. She had pacemaker checked on 8/29/06 and it was good. To f/u in January to repeat echo. If that shows normal to minimally decreased LV function, will probably stop her digoxin and will begin to reduce her diuretics. AR at 00646.

01/05/2007 - Letter from Dr. Lavery to Dr. Claussen. Patient seen for mild fatigue and musculoskeletal issues, but in general feels fairly well. Had her pacemaker checked on 12/19/06 with good RV and LV thresholds and is 100% atrial sensed ventricular paced. She has normal chamber dimensions and good function with a normal ejection function. At this point do not see any continued indication for Coumadin. Will f/u in 4 months and possibly get her off diuretics. AR at 00645.

01/05/2007 - Echocardiogram - Normal left ventricular size, good systolic function, normal wall motion and ejection fraction 55-60% Wall thickness is normal. Flow patterns across the mitral valve are compatible with impaired LV relaxation. Compared to echo of January 2006, there has been further improvement in ejection fraction. AR at 00651.

03/22/2007 - History and Physical from Elliot Hospital. Patient is admitted with chest pain. Basically, she has chronic chest pain with fibromyalgia and a cardiomyopathy. These pains come and go though not terribly frequently. Chest x-ray basically unremarkable. She has hyperlipidemia, depression, hypertension, chronic obstructive pulmonary disease, and cigarette abuse. Patient admitted to rule out myocardial infarction. AR at 00641-00642.

03/23/2007 - Discharge Summary from Elliot Hospital. Discharge diagnoses: Atypical chest pain, cardiomyopathy, fibromyalgia, hyperlipidemea. Patient to follow-up with Dr. Claussen about further adjustments in her Lipitor dose or consideration for adding Zetia to further lower her LDL. She will resume

her previous diet. She will gradually resume previous levels of activity. AR at 00643-00644.

05/07/2007 - Letter from Dr. Lavery to Dr. Claussen. Patient was hospitalized at the Elliot in May with atypical chest pain somewhat hypokalemic resulting in an increase in her potassium. She was also found to be significantly hyperlipidemic and has recently added Zetia to her Lipitor. She feels well, is now walking 5 miles a day. She is no longer having any chest discomfort, and while she is still dyspneic she is able to complete her walk. Her pacemaker check is in order. AR at 00640.

Joint Statement of Material Facts at 15-16. The parties summarized Dr. Claussen's records as follows:

09/27/2006 - Office note from Dr. Claussen. Patient seen for chronic f/u visit regarding cardiomyopathy, COPD, and fibromyalgia. She saw Dr. Thies for the first time in several years for f/u of chronic pain issues related to fibromyalgia. Dr. Thies stated that everything was okay and he would make no changes in her medications according to the patient. Patient recently saw Dr. Lavery for her cardiomyopathy. He scheduled her for an echo in January and told her he may be stream lining her medication. Was started on a course of Protonix for symptoms of abdominal pain felt to be due to possibly gastritis or gastroesophageal reflux. She complains today of frequent headaches associated with photophobia, phonophobia and some nausea. AR at 00636-00637.

11/13/2006 - Office note from Dr. Claussen. Seen today for chronic f/u. She complains of frequent headaches. She states she gets a headache 2-3 days a week. She recently saw Dr. Thies for her fibromyalgia and chronic musculoskeletal pains. No medications changes were made. She denies any chest pain, shortness of breath, cough, sore throat. AR at 00633-00634.

12/19/2006 - Office note from Dr. Claussen. Patient is seen regarding her CHF and some other issues. She complains of 4-6 week history of nasal congestion. She continues to complain of abdominal bloating. She feels

as though her pants do not fit her well. The bloating has not changed and has not responded to OTC medicines. She states her abdomen feels like a balloon shortly after eating. This feeling does resolve over time but recurs with each meal. Will try Zelnorm. AR at 00630-00631.

01/31/2007 - Office note from Dr. Claussen. F/U multiple issues. Her cardiologist did a recent echo and noted her normal cardiac function. She was started on Zelnorm at last visit for abdominal bloating and constipation - seemed to help. She is bothered today by a rash on her left buttock that has been present for several weeks. She is wondering if she might have psoriasis. Assessment: Cardiomyopathy - encouraged that patient has been taken off some of her higher strength cardiac meds. No longer on anticoagulation. Switched to low dose aspirin. AR at 00628-00629.

04/02/2007 - Office note from Dr. Claussen. F/U visit. Patient seen for number of reasons. She was hospitalized at Elliot Hospital last week for atypical chest pain. Her cardiologist thought that her atypical chest pain was likely anxiety-related. She has been under a lot of stress lately. She has difficulty sleeping, particularly difficulty falling asleep. Negative for GI or GU problems. She denies dyspnea or chest pain on exertion. Assessment: Atypical chest pain, depression/dysthymia, hyperlipidemia, dry nose, fibromyalgia, COPD. AR at 00626-00627.

04/30/2007 - Office note from Dr. Claussen. F/U depression. Patient was changed from Zoloft to Citalopram at her last visit on April 2nd. Thus far, she has tolerated the Citalopram well and states it is helping. She states she is sleeping better and her moods are better. Over the last year she has been taken off of Lasix, Digoxin and Coumadin. An echo in January showed normal ejection fraction between 55 and 60%. AR at 00624-00625.¹

07/06/2007 - Office note from Dr. Claussen. F/U multiple issues. She saw her cardiologist in the Spring and underwent a stress test back in March. She

¹ The record suggests that an ejection fraction of 50% or better is considered normal.

took Zetia for a few months and saw a nice drop in her cholesterol levels on lab work in May. She complains of urinary frequency and burning for about the last week. A UA done in the office today shows trace leukocytes and trace blood. Assessment - Cardiomyopathy - improving systolic function with medical therapy. It appears she is still on the diuretic and potassium supplement and wishes to continue. AR at 00622.

08/20/2007 - Office note from Dr. Claussen. F/U visit. Patient complains of discomfort in her lower back, pelvis, groin and hips. She had called 4 weeks ago requesting an anti-inflammatory drug. She continues to complain of a burning sensation in her groin and vulvar area. COPD - appears stable. Vulvar/perineal pain with burning - suspicion of lichen sclerosis. AR at 00620-00621.

10/16/2007 - Office note from Dr. Claussen. F/U multiple issues. She states her breathing is generally not too bothersome. She complains of symptoms of frequent heartburn. In the last week, she has woken up from sleep once or twice. She has also had heartburn on waking in the morning a few times. She admits to some increased stress of late. Her ex-boyfriend/roommate suffers from alcoholism which has been quite a strain on their relationship. Assessment: Anxiety, hypertriglyceridemia. AR at 00619.

11/19/2007 - Office note from Dr. Claussen. Sinus issue. AR at 00618.

Joint Statement of Material Facts at 16-17.

In January of 2008, Frost's medical records were reviewed by Connie Behrle, one of Hartford's in-house nurse consultants, who concluded that: (1) Frost's primary diagnosis was no longer cardiomyopathy; (2) her primary diagnosis was now fibromyalgia, though she was receiving treatment from her primary care

physician and had not been referred to a rheumatologist or had additional testing to rule out any other diagnosis that might be the source of her pain; and (3) the level of functioning Frost described in her interview and as shown on the surveillance videos "would seem comparable to a sedentary or light work capacity." Admin. Rec. at 54.

In February of 2008, Dr. Claussen again opined that Frost was incapable of performing light or sedentary work on a full-time basis. Admin. Rec. at 570-71. Nevertheless, based upon the report from Hartford's in-house nurse, as well as the office notes from both of Frost's treating physicians, Dr. Claussen and Dr. Lavery, Hartford could have plausibly concluded that: (1) since she was first deemed to be totally disabled approximately six years earlier, Frost's ejection fraction had "markedly improved" and she was demonstrating "normal ejection function"; (2) by May of 2007, she was feeling well and walking up to 5 miles a day; (3) her pacemaker was functioning normally; (4) an echocardiogram revealed that she had normal cardiac function; (5) as her condition improved, her cardiac medications had been significantly reduced; (6) she no longer complained of shortness of breath, though she did continue to suffer from mild fatigue and periodic sleep disturbances; and (7) her ability to engage in moderate physical activities (as she herself reported and as

shown on the videos) strongly suggested that, at a minimum, she was no longer as incapacitated by her illnesses as she had been when she first began receiving disability benefits.

In March of 2008, Hartford submitted Ms. Frost's medical records to two independent physicians to obtain their professional opinions as to whether Frost's conditions - primarily the cardiomyopathy and fibromyalgia - had improved sufficiently to permit her to return to work. Dr. Dayton Dennis Payne, a board certified rheumatologist, opined that, "Following a careful and thorough review of the medical record data presented, there are no findings from a rheumatology viewpoint that would be expected to be producing restrictions or limitations on [Ms. Frost's] activities." Admin. Rec. at 554. And, Dr. Mark Friedman, a board certified cardiologist, observed that:

The diagnosis of a non ischemic cardiomyopathy with improved LV systolic function with medical therapy and biventricular pacing would not preclude a return to work. The claimant's cardiac function has returned to normal as measured by the Adenosine Nuclear Stress Test in 05/2007 demonstrating a LV ejection fraction of 57 percent and an echocardiogram from 01/2007 demonstrating LV ejection fraction of 55 to 60 percent. Although the claimant would need to continue on her medical therapy and continue to use her pacemaker the claimant would not be limited to a degree that would preclude her return to work. The claimant would have some limitations and restrictions related to her cardiac status (listed below), however these

limitations and restrictions would not preclude the claimant from returning to work.

Admin. Rec. at 556. Ultimately, Dr. Friedman concluded that:

The claimant has a history of nonischemic cardiomyopathy that was diagnosed in 2001. At that time the claimant had evidence for severe LV systolic dysfunction and NYHA Class III heart failure. With appropriate medical therapy and with implantation of a biventricular pacemaker the claimant had marked improvement of her LV function so that by 01/2007 the claimant had a normal LV ejection fraction of 55 to 60 percent. In 05/2007, the claimant was reported to be walking five miles per day and on the surveillance DVD from 07/2007 and 08/2007, the claimant was observed to be acting normally, with no obvious distress, with normal levels of physical activity. From a cardiac perspective, the claimant has had marked improvement in her functional capacity and the claimant would be capable of returning to full time work with the limitations and restrictions noted above.

Id. at 557-58.

Subsequently, in March of 2008, an employee of Hartford completed an "employability analysis" and concluded that Frost was capable of performing at least ten sedentary and light occupations, each of which would provide her with more than enough income to exclude her from the Plan's definition of total disability. Admin. Rec. at 547-49. See also Admin. Rec. at 45-47. The following week, Hartford notified Frost that it had determined that she no longer met the Plan's definition of disabled and, therefore, it was terminating her long-term

disability benefits, effective April 1, 2008. Admin. Rec. at 542-46. Frost appealed that determination. Admin. Rec. at 511. See also Admin. Rec. at 169-71. In response, Hartford asked her to submit to an independent medical evaluation. She agreed and, on October 14, 2008, she met with Dr. Barbara O'Dea.

In addition to giving Frost a physical examination and taking her medical history, Dr. O'Dea also reviewed Frost's medical records dating back to January of 2001, including the reports prepared by the two independent reviewing physicians. Dr. O'Dea prepared a lengthy and detailed report, which she submitted to Hartford. Admin. Rec. 119-27. After discussing Frost's medical history and the improvement in her condition as a result of the pacemaker and medical treatment, Dr. O'Dea concluded that:

There is no doubt that patient was significantly disabled with the cardiomyopathy initially with her thrombus formation and congestive heart failure. However, by 2007, her cardiac function with therapy and the pacer had returned to normal. She does have permanent limitations as described by cardiologist reviewer based on her past history of this and her continued need for pacemaker. Any further limitations that she has currently are not based on cardiac issues.

Patient has COPD likely mild to moderate amount that does not preclude sedentary to light activities. Her complaint of irritable bowel syndrome is not functionally limiting.

Therefore, patient's main diagnosis potentially affecting return to work is her fibromyalgia, anxiety

and depression. The rheumatology opinion was that there was no evidence of inflammatory or degenerative arthritis. He found no limitations were needed based on rheumatological viewpoint. Regardless of whether a patient should be considered disabled due to subjective pain, the subjective presence of pain leads to self limiting behavior which leads to deconditioning. This deconditioning can be a more objective source of physical limitation. This appears to be the situation in this patient's case. However, deconditioning does not preclude sedentary to light activities for this patient, at least part time, as evidenced by her exam today, by her own description of her daily activities, and by the surveillance videos. The effect of her anxiety and depression on her attention ability for detailed work is beyond the scope of this exam.

She is currently capable of return to sedentary work, part time 4 hours a day. She should have the ability to stand or sit when needed for comfort. She should avoid lifting greater than 10 pounds. She should avoid lifting over shoulder height. She should not do jobs requiring balance or heavy machinery. She should avoid pushing or pulling. She has no restrictions on fine motor activities. She should return to her walking exercise and light lifting and stretching exercises.

Admin. Rec. at 127 (emphasis supplied).

By letter dated October 28, 2008, Hartford notified Frost of its decision to uphold its earlier termination of her long-term disability benefits, concluding that:

In summary, our appeal review concludes the weight of the information in the claim file viewed as a whole supports that Ms. Frost is medically capable of performing sedentary and light work at least on a part time basis.

. . . Taking into consideration Dr. O'Dea's restriction that Ms. Frost may work 4 hours a day, the occupations

listed in the employability analysis would meet the required earning potential at 4 hours per day.

Because Ms. Frost is medically capable of part time sedentary and light work and vocationally employable within her work restrictions, she is not disabled and the decision to terminate her LTD benefit payments is correct under the terms of the policy.

Admin. Rec. at 117 (emphasis supplied). This suit followed.

Standard of Review

I. Generally.

Cases brought under ERISA require the district court to employ a somewhat modified version of the standard of review typically applied to motions for summary judgment. Rather than take evidence or consider affidavits and deposition testimony, the court "evaluates the reasonableness of an administrative determination in light of the record compiled before the plan fiduciary." Leahy v. Raytheon Co., 315 F.3d 11, 18 (1st Cir. 2002). Consequently, this court sits more as an "appellate tribunal than as a trial court" in determining whether a plan administrator's benefits eligibility decision is sustainable. Id. This means that "summary judgment is simply a vehicle for deciding the issue," and "the non-moving party is not entitled to the usual inferences in its favor." Orndorf v. Paul Revere Life Ins. Co., 404 F.3d 510, 517 (1st Cir. 2005) (citation omitted).

Here, Frost acknowledges that, under the terms of the Plan, "Hartford has full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Group Insurance Policy." Complaint, at para. 7 (quoting the Plan). See also, Admin. Rec. at 957. She also acknowledges that this court's review of Hartford's decision to terminate her long-term disability benefits is governed by the deferential "arbitrary and capricious" standard of review. Plaintiff's Memorandum (document no. 15-2) at 6. See generally Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

Under the arbitrary and capricious standard of review, this court must uphold a plan administrator's benefits eligibility determination if its decision was reasoned and supported by substantial evidence. As the court of appeals has noted:

When, as in this case, a plan administrator has discretion to determine an applicant's eligibility for and entitlement to benefits, the administrator's decision must be upheld unless it is "arbitrary, capricious, or an abuse of discretion." In other words, the administrator's decision must be upheld if it is reasoned and supported by substantial evidence. Evidence is substantial if it is reasonably sufficient to support a conclusion, and the existence of contrary evidence does not, in itself, make the administrator's decision arbitrary.

Gannon v. Metro. Life Ins. Co., 360 F.3d 211, 212-13 (1st Cir. 2004) (footnote and citations omitted). See also Doyle v. Paul

Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)

("Substantial evidence . . . means evidence reasonably sufficient to support a conclusion. Sufficiency, of course, does not disappear merely by reason of contradictory evidence.").

Necessarily, then, whether the court would award benefits to Frost under the Plan is immaterial. See, e.g., Brigham v. Sun Life of Canada, 317 F.3d 72, 85 (1st Cir. 2003) ("The question we face in this appeal is not which side we believe is right, but whether [the defendant] had substantial evidentiary grounds for a reasonable decision in its favor.") (citation and internal punctuation omitted). The sole issue presented is whether there is "reasonably sufficient" evidence in the record to support Hartford's denial of benefits.

II. Conflicts of Interest.

In those cases where the plan administrator also funds the plan's obligations out of its own resources (such as when an insurance company underwrites the plan and also determines when and to whom benefits are payable), there exists an obvious conflict of interest. And, for years, courts have wrestled with how (and to what degree) they should weigh that conflict in deciding whether a benefits eligibility determination was "arbitrary and capricious." See, e.g., Thompson v. Liberty Life

Assur. Co., 2007 DNH 119 at 4-5 (D.N.H. Sept. 24, 2007) ("To be sure, numerous courts, including this one, have questioned the propriety, and even fairness, of the 'arbitrary and capricious' standard of review in cases where the same entity that makes eligibility determinations also funds benefit payments."). The Supreme Court recently addressed just that issue. Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008).

In Glenn, the Court specifically held that even in cases involving conflicts of interest, the governing standard of review remains "arbitrary and capricious." But, courts should take into account the existence of such conflicts when evaluating the many case-specific factors involved in benefits eligibility disputes.

In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessarily depending upon the tie-breaking factor's inherent or case-specific importance. The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that

penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.

Id. at 2351 (citations omitted). Citing that language, the court of appeals for this circuit recently held that district courts "are duty-bound to inquire into what steps a plan administrator has taken to insulate the decisionmaking process against the potentially pernicious effects of structural conflicts." Denmark v. Liberty Life Assur. Co., 566 F.3d 1, 9 (1st Cir. 2009). In Denmark, however, the court of appeals recognized that there may be cases in which the plan administrator's benefits eligibility determination is so plainly supported by the record that even the presence of an actual conflict of interest will not compel reversal of that decision. Id.

With those principles in mind, the court turns to the parties' pending motions.

Discussion

I. Weight to be Ascribed to the Structural Conflict.

Frost argues that Hartford's "conflict of interest is significant in this case," and says the "facts and circumstances of this case are more compelling [than those] in [Glenn]."
Plaintiff's memorandum at 7. The court disagrees.

Plainly, this case involves a "structural conflict" - that is, Hartford not only determines eligibility for disability benefits, but it also funds those disability benefits. Consequently, Hartford has an obvious financial incentive to deny claims for benefits under the Plan. But, Frost has not pointed to any evidence suggesting that Hartford's benefits eligibility determination was infected by a financial desire to minimize the outlay of corporate funds. Nor has she suggested that Hartford "has a history of biased claims administration," Glenn, 128 S. Ct. at 2351, or that it acted in an "offhand [manner when] discounting contrary medical opinions," Denmark, 566 F.3d at 8.

Instead, the record evidence suggests that Hartford's decisions were not influenced by financial concerns and were, instead, based solely on Frost's medical records and the videos showing her physical abilities (at least on the days she was observed). For example, Hartford reviewed and granted Frost's initial request for long-term disability benefits, concluding that she could not perform the essential functions of her occupation. It then extended those benefits (and continued paying them for more than six and one-half years), after repeatedly concluding that she was precluded from performing any occupation for which she was qualified by education, training, or experience.

Additionally, prior to terminating Frost's benefits, Hartford reviewed the treatment notes taken by both her primary care physician and her cardiologist, which revealed that her condition had substantially improved; reviewed the surveillance tapes which plainly demonstrated various activities in which Frost was able to engage; referred Frost's case out to two independent, board certified, physicians for their opinions on any medically-related limitations she might have which would preclude gainful employment; conducted an "employability analysis" to determine if there are jobs in the national economy which she might perform, in light of her limitations; and, referred the matter to a third independent physician, who took Frost's medical history, performed a physical examination, and reviewed all of Frost's medical records.

Hartford's structural conflict, arising from its role as both Plan administrator and the entity responsible for funding the Plan's obligations, is one of many factors the court must consider in resolving this case. But, given the record evidence, it is not a factor entitled to substantial weight, and cannot tip the balance in plaintiff's favor.

II. Hartford's Decision to Terminate Benefits.

The record, when considered as a whole, is more than sufficient to support Hartford's conclusion that: (1) since the date on which she became disabled, Frost's condition has improved substantially; and (2) as of April 1, 2008, Frost was, at the very least, capable of part-time sedentary work, as described by Dr. O'Dea. Given Dr. O'Dea's conclusions, as supported by the medical opinions of Dr. Payne and Dr. Friedman, Hartford's determination that Frost no longer met the Plan's definition of total disability cannot be said to have been arbitrary, capricious, or an abuse of discretion. Hartford's decision is, in other words, supported by substantial evidence.

To be sure, there is evidence in the record supportive of Frost's claim that she is, in fact, totally disabled (e.g., Dr. Claussen's opinion, given in February of 2008, that she remains incapable of full-time work, Admin. Rec. at 571, and the fact that she continues to receive Social Security disability benefits). But, as noted above, a decision can be supported by substantial evidence even when there is substantial evidence to support the opposite conclusion. Gannon, 360 F.3d at 212-13. See also Doyle, 144 F.3d at 184 ("Substantial evidence . . . means evidence reasonably sufficient to support a conclusion. Sufficiency, of course, does not disappear merely by reason of

contradictory evidence."). As the Supreme Court has noted, substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent a decision from being supported by substantial evidence. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

So it is in this case. Despite evidence supportive of Frost's claim that she remains totally disabled, there is substantial evidence in the record supportive of Hartford's conclusion that she is not. The progress notes from both Dr. Lavery (Frost's cardiologist) and Dr. Claussen (Frost's PCP), the observations of Nurse Behrle, the surveillance videos, the opinions of both Dr. Payne (independent Rheumatologist) and Dr. Friedman (independent cardiologist), and the opinion issued by the examining independent medical expert, Dr. O'Dea, all support Hartford's adverse disability determination.

Parenthetically, the court notes that, contrary to Frost's suggestion, Hartford was not required to give controlling weight to her treating physician's opinion that she remains totally disabled. See, e.g., Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003) (refusing to adopt the "treating physician rule" in ERISA cases, despite its application in Social Security

disability benefits cases, and noting that "[n]othing in [ERISA] itself suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion."). See also Tsoulas v. Liberty Life Assur. Co., 454 F.3d 69, 77 (1st Cir. 2006).

Nor was Hartford obligated to adopt Dr. O'Dea's conclusion that Frost was capable of only part-time sedentary employment. Given the thorough and well-reasoned opinions of Dr. Payne and Dr. Friedman, Hartford could have sustainably concluded that Frost was capable of light work, on either a part-time or full-time basis. That point is, however, largely an academic one. In both its original and final letters to Frost notifying her of the decision to terminate long-term disability benefits, Hartford relied on Frost's ability to perform the essential functions of at least ten specifically-identified occupations. Of those ten occupations, nine are characterized by the Dictionary of Occupational Titles as requiring work at the sedentary level; only one (Gate Guard, DOT 372.667-030) is listed as requiring work at the light level. See Admin. Rec. at 520.²

² The ten occupations specifically identified in Hartford's "employability analysis" are representative of the 412 occupations Hartford concluded Frost could actually perform. Of

Moreover, for purposes of determining Frost's eligibility for long-term disability benefits, Hartford accepted Dr. O'Dea's opinion and assumed that Frost was capable of only part-time employment. Admin. Rec. at 117. Nevertheless, even performing sedentary work on only a part-time basis, Frost is capable of earning sufficient income to render her ineligible for total disability benefits under the Plan.

III. Frost's Eligibility for Partial Disability Benefits.

Finally, Frost suggests that she is, at a minimum, "partially disabled" under the Plan and, therefore, eligible for at least reduced benefits. Specifically, she says:

In this case, the final determination was that "Ms. Frost is medically capable of performing sedentary and light work at least on a part-time basis" and that "because Ms. Frost is medically capable of part-time sedentary and light work and vocationally employable within her work restrictions, she is not disabled and the decision to terminate her LTD benefit payments is correct under the terms of the policy." (AR 117).

The policy definitions, however, state that "Disabled means either Totally or Partially Disabled." (AR 962). Benefits are payable even if the claimant is actually working but making less money. It would only be logical that the Plaintiff, who is not working, and who has no more than a four hour (half-time) sedentary (not

those, 18 were rated as "excellent" matches, given Frost's abilities, education, training, and experience. An additional 185 occupations were deemed to be "good" matches for Frost, while the remaining 209 were considered "fair" matches. Admin. Rec. at 520. See also Admin. Rec. at 46.

light) work capacity with additional non-exertional limitations according to Dr. O'Dea, the Defendant's own IME physician, that LTD would still be payable.

Plaintiff's memorandum at 9. She does not go on to develop that argument in any greater detail.

Frost's suggestion that she is eligible for long-term disability payments under the Plan's definition of "partial disability" suffers from at least two flaws. First, she did not raise that argument in her appeal of Hartford's decision to terminate her benefits and, therefore, Hartford never had the opportunity to consider it. See generally 29 U.S.C. § 1133. See also Medina v. Metro. Life Ins. Co., 588 F.3d 41, 47 (1st Cir. 2009) ("A plaintiff who wishes to raise an ERISA claim in federal court must first exhaust all administrative remedies that the fiduciary provides.").

Second, Frost does not appear to meet (nor does she claim that she meets) the eligibility requirements of partial disability under the Plan. See Admin. Rec. at 957 (providing, among other things, that, to be eligible, the employee must be "performing at least one of the material duties of [his or her] own occupation on either a full-time or part-time basis."). Her claimed entitlement to partial long-term disability payments is based simply upon her suggestion that it would be "logical,"

plaintiff's memorandum at 9, not that she actually meets the specific requirements of "partial disability" under the Plan.

Conclusion

For the foregoing reasons, as well as those set forth in Hartford's memorandum, Hartford's motion for judgment on the administrative record (document no. 16) is granted. Frost's motion (document no. 15) is denied.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.



Steven J. McAuliffe
Chief Judge

January 28, 2010

cc: Janine Gawryl, Esq.
Byrne J. Decker, Esq.